F. A. Bartlett Tree Expert Co., Inc. *and* International Brotherhood of Electrical Workers, Local Union 934. Cases 10–CA–26541 and 10–CA–26901

April 21, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On June 30, 1994, Administrative Law Judge Robert C. Batson issued the attached decision. Counsel for the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the exceptions in light of the record and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions for the reasons stated below, and to adopt his recommended Order.

In agreeing with the judge that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with copies of all of its customer contracts, as the Union requested, we find that the Respondent's bargaining position did not trigger an obligation to provide them and that the General Counsel has not otherwise shown their relevance.

The Respondent, a line-clearance contractor, is party to five contracts with utility companies in the Bristol, Virginia and Kingsport, Tennessee area and a contract with the Virginia Department of Transportation, which were secured through competitive bid. During negotiations for an initial collective-bargaining agreement the Respondent provided the Union with wage rate and benefit data which revealed disparities ranging from 2 to 30 percent in wages among the highest paid unit employees working in the same classifications under the different line-clearance contracts. The Union proposed a 40-percent increase in compensation and the standardization of wages within each job classification across contract lines. The Respondent took the position that if it standardized wages, it may have to decrease the wage rate of the highest paid employees. It countered with a smaller across-the-board increase, with additional increases based on merit. In a letter dated July 1, 1993,[2] the Union requested that the Respondent furnish copies of its customer contracts claiming that the Respondent had asserted an inability to pay the wages it proposed, and that it was necessary to review the contracts in order to evaluate the Respondent's proposals and to formulate its own proposals on wages. By letter of July 13, the Respondent denied taking an inability to pay posture and refused to provide the contracts. The Respondent stated in the letter that its position was that it ''will not remain competitive if it is forced to increase wages for all employees up to the level of the highest paid no matter whether the employee is working on, for example, Kingsport Power Company property in Tennessee or Bristol Power Company property in Virginia.'' It asserted that ''such an increase would not reflect the reality of the [Respondent's] business because its customer contracts *are* different, and an across-the-board increase to the highest wages paid under any contract would render the [Respondent] non-competitive and erode its already low profit margin with regard to all of its utility contracts.'' (Emphasis in original.) It is not disputed that the customer contracts contain sensitive financial information, including profits and rates that the Respondent charges customers for trucks, saws, manpower, and administrative costs.

In dismissing the complaint, the judge relied heavily on *Nielsen Lithographing Co*., 305 NLRB 697 (1991), enfd. sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992), in which the Board found that a claim of competitive disadvantage does not compel an employer to open its financial records to the Union. Although we agree, as stated above, that the Respondent did not violate the Act, we find that the instant case is not a *Nielsen* case. There, the issue was the characterization of the employer's claims that it could not remain competitive absent substantial economic concessions from the union and whether those claims were tantamount to ''hardship'' and ''poverty'' claims that make it incumbent on an employer to open its books to the union upon request as required by *Truitt Mfg. Co*., 351 U.S. 149 (1956). In the instant matter, the complaint does not allege and the General Counsel does not contend that the Respondent's statements constitute inability to pay claims or that the Respondent has run afoul of *Truitt Mfg. Co*. or *Nielsen Lithographing*. Rather, the General Counsel's position is that by basing rejection of the Union's proposal to increase and standardize wages on the fact that its customer contracts vary, the Respondent has incurred an obligation to furnish those contracts to the Union. Thus, although the nature of information contained in the contracts and the parties' statements in their July 1 and 13 correspondence ostensibly give rise to a *Nielsen Lithographing* analysis, that case does not resolve the issue as the General Counsel has framed it.

The Board has long held that data concerning the employees' wages, hours, and terms and conditions of employment is presumptively relevant and must be provided to the employees' collective-bargaining rep-

[1] In the absence of exceptions, we affirm the judge's findings that the Respondent did not unlawfully threaten employees with job loss and closure, make statements of futility, or issue warnings for lateness and a safety violation to employee Dickie Hutson.

[2] All dates refer to 1993 unless otherwise indicated.

resentative. *Whitin Machine Works*, 108 NLRB 1537 (1954), enfd. 217 F.2d 593 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). Information that does not directly concern wages, hours, and terms and conditions of employment does not enjoy a presumption of relevance, and a specific need for it must be established. Such information includes profit and financial data. *United Furniture Workers of America AFL–CIO v. NLRB*, 388 F.2d 880 (4th Cir. 1967), affg. *White Furniture Co.*, 161 NLRB 444 (1966). Further, an articulation of general relevance is insufficient. *E. I. Dupont de Nemours & Co. v. NLRB*, 744 F.2d 536 (6th Cir. 1984).

In the instant case, the Union seeks information that is not presumptively relevant for collective bargaining. The basis for the request, i.e., that the information contained in the contracts is necessary to make a reasonable wage proposal is nothing more than another way of saying that it is needed ''to bargain intelligently'' and this general claim is simply insufficient to establish relevance. *E. I. Dupont*, supra. As for the General Counsel's contention that the contracts must be provided because the Respondent ''made an issue of them'' in the bargaining process, we think the General Counsel has misapprehended the significance of the references to the contracts by the Respondent's bargaining representatives. The Respondent was making the point that it obtained its revenues through individual contracts with individual customers secured through bidding processes, and that, in its view, standardizing wage rates at the highest current level in each job classification was not appropriate in such a system. Given the nature of contract bidding procedures, the General Counsel cannot plausibly claim that the Union would need to examine the contracts in order to assure itself that the customers were not all paying the Respondent exactly the same amount on each contract. The General Counsel has identified no other purpose for seeing the contracts that does not amount to verifying an inability to pay claim, and as noted above, the General Counsel is not contending that the Respondent raised such a claim. Hence, the General Counsel has not established the relevance of the contracts to the collective-bargaining negotiations or any other facet of the Union's representative functions. We accordingly find that the Respondent has not violated Section 8(a)(5) and (1) of the Act as alleged.[3]

[3] The General Counsel has not cited any case in which the Board has required an employer to turn over its customer contracts, but we emphasize that we are not suggesting any flat prohibition against such a requirement. Whether an employer is required to provide such information depends on what facts are shown in a given case concerning the relationship of such contracts to representational functions of the union. Thus, in *Anchor Motor Freight*, 296 NLRB 944 (1989), in which the complaint alleged a violation of Sec. 8(a)(5) on the basis of refusals by two employers (subsidiaries of the same parent) to supply certain customer contracts and bid documents in connection with grievances filed by the union, the Board dismissed the complaint only because the union had showed nothing beyond ''mere suspicion'' that the contracts might be relevant to the grievance. Id. at 949.

In view of our disposition of the case, we find it unnecessary to reach the judge's discussion of the breadth of the information request and of the confidentiality issue.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

J. Howard Trimble, Esq., for the General Counsel.[1]
Gary L. Lieber, Esq. (Schmeltzer, Aptaker & Shepard, P.C.), of Washington, D.C., for the Respondent.
John Ketron, IBEW Local 934, of Blountville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. I heard these consolidated cases in trial at Kingsport, Tennessee, on January 24, 1994. An order consolidating cases, amended consolidated complaint, and notice of hearing was issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) in Atlanta, Georgia, on November 12, 1993,[2] the operative complaint here. The charge in Case 10–CA–26541 was filed on February 4, amended on March 18, and amended a second time on November 8. The charge in Case 10–CA–26901 was filed on July 26 and amended on November 8. All charges and amended charges were filed by the International Brotherhood of Electrical Workers, AFL–CIO, Local Union 934 and were timely served on Respondent. The complaint alleges that Respondent by its admitted statutory supervisor, James Mike (Bull) Snodgrass, on or about November 11 and December 16, 1992, committed acts in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening its employees with loss of jobs; that it would be futile to select the Union as their collective-bargaining representative; and that Respondent would abandon its contracts with various utility companies and close its Kingsport, Tennessee facility if the Union won the Board-conducted election. The complaint further alleges that on December 18 and 31, 1992, Respondent by its supervisor, Snodgrass, and Robert Lane, respectively, committed acts in violation of Section 8(a)(3) and (1) of the Act by issuing written warnings to its employee, Dickie Hutson, in retaliation for his union membership and activities. Finally the Government alleges that Respondent's failure and refusal to provide the Union with copies of all its contracts with various utility companies and the Virginia Department of Transportation requested on July 1, which information was relevant and necessary to the Union's statutory performance of its function as the exclusive representative of all the employees in the appropriate unit, described below, is a violation of Section 8(a)(5) and (1) of the Act.

The Respondent admits all the complaint allegations, except that it has committed any unfair labor practices. The

[1] Hereinafter the General Counsel.
[2] All dates hereafter are 1993 unless otherwise indicated.

8(a)(1) and (3) allegations turn upon the credibility of the single witness testifying with respect thereto. In defense of the 8(a)(5) allegation, the Respondent contends that during negotiations it never pleaded an inability to meet the Union's demands which might trigger a duty to furnish the requested information under *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), and its progeny, but rather it pleaded the necessity to remain competitive in a very competitive field and thus did not ignite the duty to provide the Union with the financial data it sought under the Board's supplemental decision and order in *Nielsen Lithographing Co*., 305 NLRB 697 (1991), and *NLRB v. Harvstone Mfg. Co*., 785 F.2d 570 (7th Cir. 1986).

As further explicated below, I find the uncorroborated testimony of the single witness, Dickie Huston, presented by the counsel for the General Counsel in support of the 8(a)(1) and (3) allegations to be entirely too unreliable to make out a prima facie case that the Respondent engaged in the conduct alleged to discourage union activity. I further find that positions taken by Respondent with respect to the Union's proposals in negotiations did not trigger a duty under *Truitt* and its progeny to require the Respondent to provide the Union with copies of all its contracts with all its clients, which would disclose more than simply financial data. Accordingly, Respondent has not engaged in any conduct in violation of the Act and I shall recommend that the complaint be dismissed in its entirety.

On November 17, 1992, by secret-ballot election was conducted under the supervision of the Regional Director for Region 10 in a unit of ''All utility clearance employees employed by Respondent at its Kingsport, Tennessee district, including climbers and ground employees, but excluding all other employees, garage mechanics, office clerical employees, professional employees, guards, crew foreman and all other supervisors as defined in the Act.'' As a result of the November 17, 1992 election, on November 25, 1992, the Regional Director for Region 10 of the Board certified the Union, the Charging Party, and the International Brotherhood of Electrical Workers, Local Union 637, jointly, as the exclusive collective-bargaining representative of all the employees in the unit described above.

All parties were afforded the opportunity to call, to examine and cross-examine witnesses, and to present all relevant evidence. I have considered the entire record, including briefs filed by the General Counsel and the Respondent. I carefully observed the demeanor of witnesses as they testified considering the reasonableness and probability of their testimony and any self-interest which might be gained therefrom. Based on the above and more particularly on the evidence and reasoning set forth below, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The employer is a connecticut corporation with a facility called the ''Kingsport District'' located at Kingsport, Tennessee, where it is engaged in the business of providing utility line right-of-way clearance services in the Tennessee and Virginia areas. During the 12 months preceding the issuance of the complaint here, which is a representative period, the Respondent provided services valued in excess of $50,000 to customers located directly outside the State of Tennessee. The complaint alleges, Respondent admits, the evidence establishes, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, the parties admit, and the evidence establishes that the Unions, International Brotherhood of Electrical Workers, Local Unions 934 and 637, are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Business*

The core, if not the totality of Respondent's operation in the Kingsport District, is grounded on its periodically negotiated contracts with Appalachian Power Company; Bristol Virginia Utilities; Kingsport Power Company; Elizabethton Electric System; and the Virginia Department of Transportation. As indicated above, the Employer clears the right-of-way for power lines. At the time of the trial the Employer had 25 to 37[3] crews consisting of two employees each, a crew foreman, admitted to be a statutory supervisor, a climber, and a groundsman. There were two general foreman, at times material here, they were Mike (Bull) Snodgrass and Robert Lane. Their duties were to supervise the crews. According to Lane they tried to go to the site of each crew everyday, but were frequently not able to do so. The routine for reporting to work at the time of the events here was to report to the Kingsport district office where the crew chief or foreman picked up a truck, in this case an aerial bucket truck and a chipper or grinder which ground the limbs and brush cut from trees to clear the right-of-way. However, it was not uncommon for a climber or groundsman to telephone the district office before the 7 a.m. reporting time and request permission to report to the jobsite instead of the district office.

B. *The 8(a)(1) and (3) Allegations*

The Government's sole employee witness testifying to these allegations was Dickie Hutson, a groundsman on the crew of Glen Gillenwater.[4] Jimmy Sanders was the climber on that crew.

Hutson testified that at some point in time while working in the Rock Springs area of Kingsport he told Gillenwater that he was a supporter of the Union and if they elected him he would be on the negotiating committee because he had been with the Union previously in that capacity. At about the same time, Hutson testified that he wore a ''union sticker'' on his ''hard hat'' which was furnished by the Company and ''Glen told me that I might ought to take that off because it would be defacing company property and that I shouldn't be doing that, and that I could get wrote up for it.'' Upon objection to this testimony by Respondent, the General Counsel asserted that the testimony was offered merely to establish employer knowledge of Hutson's union sympathies and specifically disavowed offering the testimony to establish

[3] This estimate of the number of crews is based on the fact that there are 70 to 75 employees in the unit and each crew consists of only two unit employees.

[4] Gillenwater and all crew chiefs or foreman were either stipulated or found to be supervisors within the meaning of Sec. 2(11) of the Act.

a violation of the Act. (Tr. 21.) Accordingly, no finding to that effect will be made.

Hutson further testified that in a conversation about the Union with Snodgrass he told him he hoped the Union went in and if it did it would benefit the people of Bartlett. Snodgrass told Hutson that if the Union went in Bartlett would just let the contracts run out and would not negotiate with the Union and ''We'd all lose our jobs.'' (Tr. 22.) Hutson believes that Gillenwater and Sanders were nearby. Hutson could not place a timeframe on this alleged conversation except in response to leading questions as to a conversation he had with Snodgrass prior to the election.

Although the complaint alleges at least two conversations in which Snodgrass allegedly threatened employees with loss of jobs if they supported the Union, one on November 11, 1992, and the other on December 16, 1992, a threat of futility to select the Union and in the same or another conversation a threat to close the Kingsport facility, Hutson testified to only one such conversation.

Snodgrass denied that at any time he made statements to any employee to the effect that if the Union came in the Company would let its contracts run out; would not negotiate with the Union, or that they would all lose their jobs. He testified that on a Friday after the election while he was collecting timecards from Gillenwater on Reservoir Road in Kingsport, Hutson interrupted and asked what would happen if the Union was voted in. Snodgrass replied that he did not know ''we'll have to wait and see.'' (Tr. 137–139.)

As noted above, the totality of Hutson's testimony, including his demeanor and total inability to place any event in a timeframe, make it unreliable. The election was on November 17, yet Hutson placed it around December 18 and then December 5. He confused the election with the commencement of negotiations, which was January 6, 1993. Hutson, along with three other employees, was on the union negotiating committee, another factor affecting his reliability is his susceptibility to suggestion as demonstrated throughout his testimony in his response to leading questions. In short, I find the evidence that Respondent violated Section 8(a)(1) as alleged in the complaint insufficient to sustain the General Counsel's burden.

The testimony and evidence relating to the written warnings given to Dickie Hutson by Snodgrass on December 18, 1992 (G.C. Exh. 1), for reporting late for work and a written warning given him on December 31 (G.C. Exh. 3) by Supervisor Robert Lane for using the limb and brush grinder without wearing safety glasses is not in material dispute.

Hutson testified that on the morning of December 18 he thought he was going to be late for work and telephoned Snodgrass and so advised him and told him that he would just meet Snodgrass and Sanders, the climber, at the jobsite. Hutson said:

> And, he told me that if I was late, that they was going to write me up, and I told him that if, you know, if that had to be, it had to be. I was going to drive out on the job, and meet Glen and Jimmy on the job, because I had some things I had to do that evening, anyhow. [Tr. 25.]
>
> Hutson said he got to the job site, ''I'd say about four or five minutes after or till seven'' and prior to Gillenwater and Sanders arrival.

The common practice at that time was for all crew members to meet at the Kingsport district office at 7 a.m. and pick up the truck and grinder and then go to the jobsite. However, it is not denied that if a crew member obtained permission from the general foreman and gave an acceptable reason, such as needing his own transportation after work, it was not uncommon to permit him to do so.

Gillenwater testified that he and Sanders did not arrive at the jobsite in the Rock Springs area until 7:30 or 7:45 and that Hutson was not there at that time, but arrived a little later.

Snodgrass testified that Hutson called him about 6:45 on that day and told him he was going to be late because he had overslept and that he would report to the jobsite. Snodgrass told him that the next time he was late he was going to have to write him up. Snodgrass said that he knew where Hutson lived and it would take him 25 to 30 minutes to get to the jobsite.

Snodgrass testified that although he had told Hutson he would ''give him a warning next time he was late'' he decided to give him the warning then in view of the fact that Hutson had been late on several earlier occasions. Hutson does not deny this. Later on the day of December 18 Snodgrass went to the jobsite and issued the warning to Hutson. (G.C. Exh. 2.) Hutson testified that he concurred in the warning only because Snodgrass told him if he didn't he would have to go to the office and talk to District Manager Rob Lord and that he did not have time to do that.

I find contrary to Hutson's denial that he was in fact late reporting to the jobsite that day and that there were previous occasions on which he had been late.

The second warning given to Hutson and alleged to be discriminatory was given on December 31, 1992, by the other general foreman, Robert Lane, for failing to wear safety glasses while operating the grinder or chipper. Hutson's coworker, Jimmy Sanders, was given an identical warning at the same time. General Foreman Robert Lane testified that on December 29, 1992, he went to the jobsite where Gillenwater, Hutson, and Sanders were working to check the new or newly sharpened blades that had just been installed in the chipper they were using to see if they were grinding properly. Gillenwater was in the truck and Hutson and Sanders were operating the chipper.[5] When Lane first observed Hutson and Sanders he testified they had an arm load of brush laying on the chipper chute and Hutson was behind the chipper getting ready to shove it through while Sanders was beside the chipper gathering up more brush. Lane testified the brush laying on the chute was ''pruner'' size, 1 to 1-1/4 inches in diameter. He told them he should give them a written warning for not wearing their safety glasses while operating the chipper. He testified that it was a safety violation and much ''more serious than missing a day's work or something

[5] A chipper is a machine used to grind the limbs and brush cut from trees in clearing the right-of-way into small chips which are blown into the truck.

like that.'' (Tr. 152.) He went back to the office and subsequently on December 31, signed the warning notices.

On December 31 Lane, accompanied by Snodgrass, went to the jobsite and gave the warnings to Hutson and Sanders. Both refused to sign, claiming that they had been observed using the chipper without safety glasses before by the foremen and had not been warned. Lane told them if they had anything to say they could talk to District Manager Rob Lord. After work they talked with Lord's assistant, Shannon Barrett, who said he would discuss their objection with Lord and give them an answer the following week. On January 5, Lord approved the warnings.

The counsel for the General Counsel argues that it was more than coincidence that Hutson had not received any disciplinary warnings in the year he had been employed until the Employer became aware of his union support. Hutson does not deny that he had been late for work on a number of occasions prior to receiving the warning of December 18. With respect to the safety glasses warning, Hutson stated that it was only small brush they were grinding and that the general foreman had seen them using the chipper without safety glasses on other occasions without giving a warning. I credit Lane that it was a serious matter and the Employer had to enforce the safety rules or run the risk of being charged by OSHA.[6]

Snodgrass testified that he was not aware of Hutson's support for the Union until the December 18 warning when Hutson told him he would sign the warning, ''But I'm a union steward.'' Rob Lord testified he was not aware of Hutson's union sympathies until January 6, when he appeared along with three other employees to be on the Union's negotiating team.

Assuming the Employer was aware of Hutson's minimal union activities prior to issuance of the written earnings, I am persuaded that such knowledge played no role in the Employer's actions toward Hutson. Even had the General Counsel made out a prima facie case he has not established the reason for the warnings was a sham or in the alternative, that under the *Wright Line* standard[7] that Hutson's union activity was a motivating factor. There is no evidence of antiunion animus or that the discipline was pretextual. The Employer's actions in this regard would have been the same without union activity. Accordingly, the 8(a)(1) and (3) allegations are dismissed.

III. REFUSAL TO FURNISH UNION COPIES OF ALL CONTRACTS WITH ALL CUSTOMERS

This allegation is what this case is all about. Prior to a discussion and analysis of the evidence and applicable law it should be noted that the counsel for the General Counsel was perhaps at a tremendous disadvantage in litigating this issue. First, Albert Keisling, business manager for Local 934 and the Union's chief negotiator, doing 98 percent of the negotiating, according to Dickie Hutson and David Johnson, business manager for Local 637, was incapacitated and could not appear at the trial. Secondly, although several members of the Union's negotiating team, including Keisling, made notes during the 9 or 10 bargaining sessions, they had given all their notes to Keisling who had either lost or misplaced them. According to Hutson and Johnson, they had searched everywhere and could not find them and Keisling had absolutely no idea of their whereabouts. Thus, the General Counsel had to rely on the rather sketchy testimony of Hutson and Johnson as to what had occurred at the bargaining table. He wound up relying primarily on 46 pages of notes of the 10 bargaining sessions taken by Attorney Gary Lieber, which are almost as sketchy as the testimony of Hutson and Johnson. Fortunately, detailed testimony of what transpired between the parties during bargaining is not critical to a resolution of the issue here.

The complaint alleges that information requested by the Union on July 1 is ''necessary for, and relevant to, the Union's performance of its function as the exclusive representative of the employees'' particularly to allow the Union to respond to certain contract proposals extended by Respondent, which proposals were said to be limited or restricted by contracts Respondent had with its various customers.

Prior to the July 1, 1993 request by the Union for copies of all contracts the Employer had with all of its clients or customers, the parties had eight or nine negotiating sessions between January 6 and May 21. A brief symposis of these negotiations and the parties respective positions may be helpful in understanding the issue prompting the Union's request for this information. The Union requested and was furnished information relating to the bargaining unit itself such as wage rates, job classification, and fringe benefits, etc. This information revealed to the Union that the Employer had a differential in the lowest and the highest paid in each of the classifications ranging up to 30 percent. In other words, the highest paid climber and trimmer made about 30 percent more than the lowest paid (Tr. 198.) The first contract presented by the Union called for a benefit package of about $13 per hour for climbers which would have amounted to about a 40-percent increase. In short, the Union's proposals amounted to a substantial across-the-board increase in wages and standardization of wages within each job classification. The Employer offered a smaller across-the-board increase, but maintained if it standardized all employees' wages those in the top bracket might actually have to take a wage cut. It wanted a smaller across-the-board increase with additional increase based on merit. The Union would not agree. At the time of the trial, the testimony was that the parties had made substantial progress and was generally only 50 to 75 cents apart on wages.

On July 1, 1993, Albert Keisling sent the following letter to Respondent's attorney, Gary Lieber:

> This will serve as an information request regarding all contracts Bartlett has with all utility companies, as follows:
>
> 1. Bartlett's contract with Appalachian Power Company.
>
> 2. Bartlett's contract with Bristol, VA Utilities.
>
> 3. Bartlett's contract with Kingsport Power Company.
>
> 4. Bartlett's contract with Elizabethton Electric System.
>
> 5. Bartlett's contract with Virginia Department of Transportation.

[6] In brief Respondent cites 29 C.F.R. § 1910.133 (eye protection).

[7] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981).

6. Any other contracts Bartlett has with all utilities within the Kingsport District Office's geographical area.

This request does not limit you to documents not in your immediate possession. This request is a result of your contention that Bartlett cannot give standardized wage increases to all bargaining unit employees, which we define as discriminatory, because of Bartlett's contractual relationship with all the different power companies; Appalachian Power Company pays more money than other power companies; that no one receives stand-by pay on Appalachian Power property and different stand-by pay on other properties.

Also this will serve as a continuing request for the explicitly aforestated information. We need this information as soon as possible.

In response to your letter dated June 30, 1993, regarding allegations that we have admitted that we have reached a deadlock, is a total aruse. The fact of the matter is the only thing we have stated is that the Bartlett Company has proven by the unfair labor practice complaint fully investigated and issued against Bartlett that you are not negotiating in good faith. I think we have a legal right to make that statement, wouldn't you agree?

As you know, both parties have made some movement in the last proposal exchanges, and we are at this time considering your last proposal. We have made numerous requests to meet and bargain since May 21st, and your allegation in your letter that we have been silent is like your other letter regarding wage increases, is simply another misrepresentation of the facts.

I am looking forward to hearing from you regarding the information requested, and a date and time to meet and continue bargaining.

Sincerely,
/s/Albert H. Keisling, Jr.
Albert H. Keisling, Jr.
Business Manager

Enclosure
pc: Dave Johnson, Local 637
Martin M. Arlook, NLRB Region 10

By letter dated July 13, 1993, Lieber responded by the following letter:

I have now completed my review of your request for information contained in your letter dated July 1, 1993.

You have requested copies of all contracts Bartlett has with its utility company customers and with the Virginia Department of Transportation on the basis that the Company has taken the position that it ''cannot'' give a standardized across-the-board wage increase to all unit employees because of the different contractual relationships Bartlett has with each of these customers. To set the record straight, the Company has never stated that it ''cannot'' give a wage increase. What I have repeatedly told you is that the Company is in an extremely competitive business and that it will not remain competitive if it is forced to increase wages for all employees up to the level of the highest paid no matter whether the employee is working on, for example, Kingsport Power Company property in Tennessee or Bristol Power Company property in Virginia. (See most recently my letter to you of June 30, 1993.) I have explained to you that such a wage increase would not reflect the reality of the Company's business because its customer contracts *are* different, and an across-the-board increase to the highest wages paid under any contract would render the Company non-competitive and erode its already low profit margin with regard to all of its utility contracts. I explained this to you throughout the negotiations and, at the same time, asked you if the Union alternatively desired to negotiate across-the-board rates that could result in a wage reduction for some employees now at the high end. You indicated no interest in this approach and, for that reason, the Company has consistently proposed minimum across-the-board rates supplemented by merit increases.

Since the Company has never relied upon its customer contracts to support any claim of *inability* to meet the Union's wage demands, the Union is not entitled under the law to this information. *Nielsen Lithographing Co*., 305 NLRB 697 (1991), enf'd sub nom. *GCIU Local 508 v. NLRB*, 141 LRRM (BNA) 2546 (7th Cir. 1992); *Concrete Pipe & Products Corp*., 305 NLRB 152, 138 LRRM (BNA) 1185 (1991), enf'd sub nom. *Steelworkers Local 14534 v. NLRB*, 142 LRRM (BNA) 2177 (D.C. Cir. 1993). *See also, Beverly Enterprises*, 310 NLRB 222, 142 LRRM (BNA) 1169, 1179–80 (1993). The Company's obvious interest in preserving the confidentiality of its customers contracts precludes the Company from releasing those contracts absent the legal obligation to do so. Accordingly, the Company must decline to provide you with copies of its customer contracts in response to your request for information of July 1, 1993.

In addition, we note that your information request has come very late in the bargaining process, after impasse has been reached and long after the Company's position on the structure of its wage proposals had been communicated to you.

Your letter of July 1, 1993 also indicates that you are waiting to hear from me regarding a new date to resume negotiations. I have indicated that we are not interested in meeting absent a constructive reason for doing so. At the same time, you have indicated in your letter that the Union is considering the Company's proposal. That proposal was made to you on June 10, 1993. There appears to be no basis to meet at this time while the Union continues its month-long consideration of the Company's offer. The Company has reserved the right to withdraw that proposal. It has not yet done so in its desire to reach an agreement if possible. However, a reasonable time has expired and the Company will soon reconsider that option. In the meantime, we are willing to meet if you give the Company a concrete basis for believing that such a meeting could break the standoff.

Very truly yours,
/s/ Gary Lieber
Gary L. Lieber

cc: David Johnson (regular mail)

The parties' last bargaining session was May 21 prior to Keisling's request for copies of all the Employer's contracts with its customers on July 1, and Lieber's refusal to furnish on July 13. The next bargaining session was not until August 25, almost 6 weeks after the Employer's refusal to furnish the contracts. The record contains no explanation or reason for the more than 3-month hiatus between sessions.[8]

A possible reason for the hiatus in bargaining might be that the Union in May or June filed a charge in Case 10–CA–62821 alleging that the Employer was engaging in bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act by certain conduct. On July 30, 1993, the Regional Director for the Region 10 refused to issue complaint. The pertinent portion of this letter indicates what the specific allegations were and were found to be without merit. (R. Exh. 2.) The allegations were:

> As a result of the investigation, it does not appear that further proceedings are warranted in this case. The charge alleges that the Employer has engaged in bad faith bargaining by refusing to make counterproposals to the Union's proposals, by negotiating directly with employees, by refusing to negotiate over all the unit employees, and, generally, by engaging in dilatory tactics. The evidence disclosed that the parties, in addition to meeting face to face, have exchanged contract proposals and counterproposals through the mail. The evidence failed to establish that the Employer engaged in dilatory tactics or failed to make counterproposals. The Employer's proposal that employees working out of one facility could be paid at a higher rate because of the terms of the Employer's bid under which those employees were working would not constitute a failure to bargain over all the unit employees. The evidence failed to establish that the Employer had attempted to bargain directly with its employees. There were no allegations of any independent violations of Section 8(a)(1) of the Act. I am, therefore, refusing to issue complaint in this matter.

On October 6, 1993, the General Counsel's office of appeals denied the Union's appeal ''substantially for the reasons set forth in the Regional Director letter of July 30, 1993.'' (R. Exh. 3.)

Based on Lieber's notes of the August 25 session, Keisling renewed the request for the customers contracts and was denied. Lieber told Keisling he did not know how much longer the Company's proposals would stay on the table and observed that the Union's July 26 proposal submitted by mail was a step backward given the lengthy hiatus between meetings. The parties discussed several other proposals as set forth in General Counsel's Exhibit 7, pp. 45–46. At the lunchbreak Keisling told Lieber he would be changing the Union's proposal and would submit it the following week. The meeting apparently adjourned since this is the end of Lieber's notes.

[8] It appears the parties exchanged some proposals by mail during this period of time.

Analysis of the Refusal to Furnish Contracts

The Act makes it an unfair labor practice for an employer to refuse to bargain in good faith with the representative of its employees. If an employer claims poverty or inability to pay then, on request from the union, the employer is required to produce or disclose financial data to support its claim of poverty or inability to pay. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). All parties to this case have cited in their briefs the Supreme Court's landmark decision in *Truitt Mfg. Co.*, supra, and recognize its continued validity. All parties also appear to concede, as they should, that if an employer does not plead poverty or inability to pay, but rather states that it is making money and simply does not want to pay any more in the nature of wages or fringe benefits to its employees, then the employer need not disclose its financial records or ''open its books'' on a union's demand or request that the employer do so.

The General Counsel appears to argue that based on the testimony of Vice President of Human Resources Victor Fleck the Respondent injected the contracts it had with its six customers as a reason it was ''unwilling'' to meet the union wage demands. In brief, he states ''Fleck admitted that Respondent was unwilling to agree to union wage rate proposals because of the contracts and the labor costs therein (Tr. 207–208). The above testimony and exhibits clearly indicate that the contracts, labor costs, and wage rates were an issue in negotiations and this issue was injected into the negotiations by Respondent.'' The exhibits referred to above are Lieber's notes taken during negotiations and received as General Counsel's Exhibit 7. He refers to pages 29, 36, 40, 42, and 43. Fleck's testimony paraphrased by the General Counsel was actually:

> Q. (Mr. Trimble): All right. You didn't accept and agree with the Union's wage proposal, correct?
>
> A. Correct.
>
> Q. And there was some discussion. Then the Company submitted wage proposals, correct?
>
> A. Correct.
>
> Q. And they were discussed?
>
> A. Correct.
>
> Q. Now, Mr. Lieber asked you if the Company ever claimed that they were unable to pay these rates but was there not some discussion of why the Company couldn't agree to the rates that the Union had asked for?
>
> A. Yes.
>
> Q. And the reasons therefor?
>
> A. The competitive market place that we were operating in made the Company unwilling to agree to the rates that the Union was proposing.
>
> Q. That had to do with your Contracts with your customers is that correct, with the utilities and with the Virginia Highway Department?
>
> A. Correct.

The General Counsel apparently does not contend that Respondent was pleading an ''inability'' to meet the Union's proposals rather than an ''unwillingness'' to do so, but argues that because Respondent injected its contracts with the several utilities as a reason for its ''unwillingness'' it some-

how triggered a duty to furnish copies of all such contracts to the Union on request.

He states he relies on the Board's decisions in three cases: *A.M.F. Bowling Co*., 303 NLRB 167 (1991); *Circuit Wise, Inc*., 306 NLRB 766 (1992); and *Bradford Coca-Cola Bottling Co*., 307 NLRB 647 (1992).

He argues, in this case, the Union is not seeking that Respondent open its books and financial records to justify concessions, but rather seeking information in Respondent's possession concerning wage rates and labor costs on its customer contracts.

First, the cases relied on by the General Counsel are inapposite and are not precedent for the simple issue raised here. In *A.M.F*., which was decided before the Board's supplemental decision in *Nielsen*, the employer was asking for substantial concessions from the union. In *A.M.F*., the Board said:

> It is clear that throughout the negotiations the Respondent was insisting that the Union accept significant wage and benefit reductions for the unit employees. Applying the principles set forth in *Reichhold Chemicals*, 288 NLRB 69 (1988), enfd. in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990). We will not scrutinize the Respondent's bargaining proposals to see if they are sufficiently generous in the circumstances here. We will address, however, the issue of whether the Respondent was required to provide the Union with substantiation for the necessity of the economic reductions the Respondent sought.

There, the employer had conducted wage surveys in the area and relied on those surveys in formulating economic proposals. The Board held that when the union requested any substantiation or documentation for the respondent's economic proposals it had a duty to furnish such wage surveys to the union. ''We emphasize, in this regard; that the Board has consistently required employers to provide any wage surveys on which they have relied in the formulation of their bargaining proposals when a union requests such information.''

It should be noted that the requirement to provide wage surveys conducted by the respondent is totally different from requiring it to provide its own financial records.

In *Circuit Wise, Inc*., the respondent proposed a profit-sharing plan by paying 2 percent of its pretax profits. This plan was offered in response to the union demand for a pension plan with a fixed level of contributions. The Union requested documentation of respondent's profits since 1985. The respondent gave the union a one-page summary for the years 1985 through 1987. The union requested more information and proposed that the pension plan contribution be made on gross profits rather than net profits. The respondent rejected this proposal. The union requested information designed to determine how the employer determined its net profits. The respondent declined to provide this information. The Board concluded, ''We find no logical or legal basis for requiring a party to accept a proposal before being given a chance to review information that is relevant and necessary to its evaluation.'' Here the information sought was merely the method by which Respondent computed its net profits.

In *Bradford Coca-Cola*, the respondent proposed that its drivers compensation be converted from an hourly wage to a commission-on-sales basis. The union requested information regarding the number of cases delivered by each unit driver the previous year. The respondent declined citing *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). The Board held this information was relevant for a meaningful evaluation of the Company's proposal. This conclusion is self-evident. The union would need to know how the proposed commission-on-sales would compare to the hourly wage rate to ascertain whether the drivers would earn more or less based on the same number of cases delivered. Again, this does not seek profit data or other aspect of the employer's financial condition.

The Respondent argues this allegation should be dismissed on three separate grounds:

1. It has no obligation to produce the requested information, its customer contracts, which gives financial data and the extent of its profits, in the absence of a showing that it has asserted an inability to meet the unions proposals. In support of this argument Respondent states:

> Here, the General Counsel asserts that the customer contracts that have at their core Company financial and profitability data should be made available because, as the Complaint asserts, it will ''allow the Union to respond'' to certain contract proposals. This contention has been flatly rejected. In *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984), the Board dismissed a complaint allegation that sought to have the employer produce its financial records to a certified public accountant. The Board stated:
>
> > Unions have a presumptive right to certain information about unit employees, such as wage rates. *Whitin Machine Works*, 108 NLRB 1537 (1954), enfd. 217 F.2d 593 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). The rule, however, is different for profit data or other aspects of an employer's financial condition. *The union must show a specific need for the information in each particular case, profit data will not be required merely because it would be ''helpful'' to the union.* [Emphasis added.] See *United Furniture Workers of America (White Furniture Co.) v. NLRB*, 388 F.2d 880 (4th Cir. 1967). An employer may, however, provide justification for requiring profit data to be furnished by claiming financial inability to meet the union's demands. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). [Id. at 1602.]
>
> In *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), the Supreme Court held that a refusal to substantiate an inability to pay constituted a refusal to bargain. For many years, the Board treated a plea of noncompetitiveness as ''the functional equivalent of a statement of an inability to pay'' under *Truitt*. The Board, however, reversed its field following the Seventh Circuit's decision in *NLRB v. Harvstone Mfg. Co*., 785 F.2d 570 (7th Cir. 1986), cert. denied 479 U.S. 821 (1986). Now, the Board treats ''*competitive disadvantage and inability to pay bargaining statements as analytically distinct*.'' *Steelworkers v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). In a series of cases following the Seventh Circuit's de-

cision, the Board has dismissed allegations that asserted that a refusal to provide financial data was unlawful when the employer reason for rejecting union proposals was the need to remain competitive. *Neilsen Lithographing Co*., 305 NLRB 697, affd. sub nom. *Graphic Communications Workers Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992); *Concrete Pipe & Products Corp*., 305 NLRB 152 (1991); *Beverly Enterprises*, 310 NLRB 222 (1993); *Georgia-Pacific Corp*., 305 NLRB 112 (1991), enfd. sub nom. *Paperworkers v. NLRB*, 981 F.2d 861 (6th Cir. 1992); see also pre-*Neilsen Advertisers Mfg. Co*., 275 NLRB 100 (1985).

In *Neilsen Lithographing Co*., 305 NLRB 697 (1991), the Board decided to follow the circuit courts of appeal in holding that a claim in bargaining of competitive disadvantage does *not* compel an employer to open its books to the union. Moreover, the Board rejected the position that any economic claim that can be ''objectively verifiable'' triggers the duty to supply information. The Board stated:

> There is a well-established distinction between claims of inability to pay and claims of something short of that. The dissent, however, wishes to draw a new distinction between claims that are objectively verifiable and those that are not. It is true that a claim of present inability to pay may be objectively verifiable. But that does not mean that all objectively verifiable claims are subject to the duty to supply information. (We would entertain the converse.) Rather, it is the fact that it is a claim of ''can't pay,'' rather than a claim of ''does not want to pay.'' If it is proven, the union will be faced with the reality that the ''well has run dry.'' This is the essential meaning of *Truitt* as we understand it. The distinction has always been between claims of ''can not'' and ''will not.'' We would not abandon that distinction in favor of a new distinction. [305 NLRB at 700.]

This argument has merit inasmuch as Respondent never pleaded an inability to pay, but in order to remain competitive it was unwilling to meet the union proposal that it raise everyone's wages to a level no lower than the highest paid employee. The Respondent's refusal to meet this demand has already been disposed of upon the General Counsel's refusal to issue a complaint. (R. Exh. 2.)[9]

2. That the Union had failed to meet its burden of showing that the financial information contained within its customer contracts was relevant to its status as collective-bargaining agent. As noted above, unions have a presumptive right for information relating to the bargaining unit employees beyond that the presumption of relevance is lost and the burden is on the union to establish relevance without the benefit of any presumption.

The Board and courts have required an initial showing of relevance to prevent needless and expensive explorations by unions into company records. Unions do not have carte blanche to examine employer information merely because the union can articulate some bargaining strategy that will render the information pertinent in some peripheral or theoretical fashion to the bargaining process. ''[T]he union's theory of relevance must be reasonably specific; 'general avowals of relevance' such as 'to bargain intelligently' and similar boilerplate are insufficient.'' See *E. I. du Pont & Co. v. NLRB*, 744 F.2d 536 (6th Cir. 1984).

The request for all of Respondent's contracts with all its customers is the broadest possible information request the Union could have made. Such information does not relate to the bargaining unit employees and the Union must demonstrate a specific need for such information which it has not done, but merely asserts a ''boilerplate'' desire for the information ''to allow the Union to respond.'' Moreover, the information sought would not only reveal Respondent's profit margin, but would disclose the financial emphasis it put on the bidding such as far as our ''rates for trucks, chain saws, or manpower or administrative costs, things of this nature.'' (Tr. 202.)

The General Counsel argues that Respondent could have offered a ''sanitized'' version, but does not articulate how the contracts could have been ''sanitized'' and still provide the Union with the information it sought in order ''to respond to the employees' proposals.'' Accordingly, this allegation would be dismissed on this ground alone.

3. This allegation should be dismissed on the Company's legitimate claim of confidentiality.

With respect to this contentions Respondent maintains that the customer contracts, containing financial data, would reveal its profitability and pricing structure is not subject to disclosure because of the confidential nature of the information. Citing *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), *the Supreme Court held that the Act requires a balancing of the interests of the employer and perhaps his employees on the one hand and the needs of the union on the other*. Later, the Board noted:

> *It is well settled that a union's entitlement to relevant information, under the general rule of law, may not always prevail over all competing situations*, and that the bargaining agent's need for the information must be weighed against the legitimate interests of the employer. A claim of confidentiality is one of those interests. [Emphasis added. *E. W. Buschman Co*., 277 NLRB 189, 191 (1985).]

The Respondent acknowledged that the party raising the confidentiality defense has the burden to demonstrate its legitimacy. See *Washington Gas Light Co*., 273 NLRB 116 (1984).

When Respondent raised the confidentiality concern in Lieber's July 13 letter denying the information sought and again in the August 25 bargaining session, Keisling nor any other union official addressed the concern such as promising not to abuse the confidentiality of the documents if it obtained them. In this case even if such promise had been made, the Respondent would have been well justified in doubting that the Union would keep the information confidential in view of the union chief negotiator's, Albert Keisling, conduct during bargaining.

[9] ''The Employer's proposal that employees working out of one facility could be paid at a higher rate because of the terms of the Employer's bid under which those employees were working does not constitute a failure to bargain over all unit employees.''

Neither the General Counsel nor the Union deny that Keisling was rude, vulgar, and abusive during negotiations as set forth in Lieber's notes (G.C. Exh. 7), which gives the Respondent ample reason to doubt his integrity. In brief, Respondent states:

> Mr. Keisling was a man whose conduct was completely unpredictable. *He was vulgar and insulting, as plainly evidenced by the cold bargaining notes* (G.C. Exh. 7, p. 13 (Company proposal ''a piece of shit'' and ''trash''); p. 23 (referring to Company employee as ''f__kin' labor law violator'' and a ''liar,'' and to Company as ''worst piece of sh__t''); p. 24 (telling Company employee ''f__k yourself'' and ''you are a piece of sh__t''); pp. 29 & 30 (Keisling continually calling contract ''trash''); p. 30 (Keisling stating, ''We'll cut your f__kin' heart out''); p. 30 (Keisling again stating, ''go f__k yourself'')).
>
> Fleck opined that he did not believe Keisling would have kept the contracts confidential (Tr. 201–204). More significant than his opinion, however, is the reference on page 43 of the bargaining notes that ''Keisling says going to 'f__k' with our customers.'' Thus, here is an admission that the Union would do whatever was necessary with third parties to achieve ''victory'' over the Company. This is in sharp contrast to other cases where the Board considered controlling, or at least a major significant factor, fact that the Union promised not to abuse the confidentiality of the documents if it obtained them.

The Respondent's contention with respect to confidentiality also has merit. Accordingly, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. Respondent F. A. Bartlett Tree Expert Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not, as alleged, violate Section 8(a)(1), (3), and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed in its entirety.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.